United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
LAWRENCE STERN

74-1455

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1455

UNITED STATES OF AMERICA,

Appellee,

-against-

LINDA SCHWARZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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INDEX TO BRIEF

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 74-1455

LINDA SCHWARZ, :

Defendant-Appellant. :

- -x

ISSUE PRESENTED

WHETHER BECAUSE THE DECISION TO FOREGO REHABILITATION ALTERNATIVES AND TO IMPOSE A 4 YEAR ADULT PENAL SENTENCE ON A 25 YEAR OLD FEMALE FIRST OFFENDER WAS EXPRESSLY BASED ON THE NATURE OF THE CRIME, A DRUG OFFENSE, DESPITE, AND BECAUSE OF, HER "FAR ABOVE AVERAGE" EDUCATIONAL AND SOCIAL BACKGROUND, THE SENTENCE WAS BASED ON ARBITRARY AND IRRATIONAL CRITERIA , WAS NOT IMPOSED ACCORDING TO LAW AND THE SPECIFIC NO BENEFIT FINDING WAS NOT MADE.

STATEMENT PURSUANT TO RULE 28 (a) (3)

A. PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Travia, J.), rendered on March 25, 1974, convicting appellant, on her plea of guilty, of possessing four ounces of cocaine in violation of 21 U.S.C. § 841 (a) (1), and sentencing her to four years imprisonment under the special provisions of 18 U.S.C. § 4208 (a) (2). Appellant is presently on bail pending appeal, pursuant to order of this Court.

B. STATEMENT OF FACTS

On February 19, 1974, appellant waived her constitutional rights to indictment and trial and pleaded guilty to a one count information charging her with possession on January 11, 1974, of four ounces of cocaine with intent to distribute. The plea was accepted by Judge Mishler in the Eastern District after appellant admitted to delivering the cocaine to someone else (minutes of 2-19-74 at 6).

Appellant was 25 years old at the time of the plea, but was due to turn 26 on March 26th.

The judge emphased that appellant must understand she faced a maximum sentence of 15 years and, therefore, "It isn't important to advise you of the possibility of being sentenced under the Youth Correction Act; the maximum sentence is more than that under that section," and that no promise as to imposition of Youth Correction Act treatment was being made (Id at p. 7). But, the Court did accede to counsel's request, "because of the fact that her 26th birthday is on March 26th; if your Honor would suggest an earlier date than that, because of the Youth Correction Act."

(Id at 9) The Court replied.

> Suppose you get Probation on the wire. This is no indication that you be sentenced under the Youth Correction Act; the point is, if I sentence you after your 26th birthday, I have no power, that's the only reason Mr. Diller suggests it. I don't want you to think that that's what you'll be sentenced under . . . What I would like to do is send this down to the Clerk's office and find out who the judge is going to be and then I'll send the memo to him, telling him at your request I fixed it at a time before your 26th birthday. We'll put it on for March 22nd . . . I would suggest that you give as full and complete a report as possible and when you go down to probation, to tell them that was a special request of mine. If they want to check back, ask them to call me. Ask the Criminal desk clerk to pick a name out and remind me to send amemo to that judge . . . I'll send a memo and explain the reason for my fixing a date, usually it's Probation.
> (Id at 9-10).

The sentencing judge to whom the case was referred, ultimately clarified the understanding between Judge Mishler and appellant when the plea was taken.

> I want the record clear that Judge Mishler, and I am sure he made it very, very clear that he was not by doing what he did, bringing it on for sentence before that date, that he meant to infer either to you or to the defendant or to the sentencing judge . . .anything other than the fact that she would be eligible, in the discretion of the Court, to receive that treatment . . .
> (minutes of April 5, 1974, at 6-7).

At the completion of the plea proceedings, the Court continued appellant on her own recognizance.

On March 22, 1974, appellant and her counsel appeared before Judge Travia. The Court informed them it had just received the

Probation Report and wanted several seeks to review it before passing sentence. Counsel objected that the whole purpose of the indictment and trial waiver, plea, and abbreviated sentence proceedings was to have appellant considered eligible for treatment under the Youth Correction Act, and that she might not be able to be so considered once her 26th birthday was passed in five days. Accordingly, in view of appellant's unblemished record and the understandings surrounding the plea and sentence, Judge Travia adjourned the sentence three days to March 25th, one day before appellant's 26th birthday.

On March 25th, counsel argued that appellant should be given Yourth Correction Act treatment. Appellant is a 26 year old college graduate who was working as an artist for Exposition Ltd. at a salary of $150.00 per week. She is a life-long resident of New York City; she was graduated from college here, and her father is a New York City High School teacher. At the time of the plea she was engaged to be married, and since then she has completed the bond. This is her first conflict with the law, and there is no evidence that she was engaged in any on-going criminal enterprise to make money. She admitted only to delivering the cocaine to someone, and she cooperated fully with the government, and at the sentence proceedings she told the judge she realized the foolishness and criminality of her act and asked for the opportunity to prove she was basically a law-abiding person who would never again engage in such activity (minutes of 3-25-74 at 18-19). Counsel argued that she was in no way a danger to society, and that incarceration in an adult prison would not be necessary as measure to protect society from a dangerous person, nor would it serve to teach appellant the lesson she had certainly already learned, indeed that such incarceration for any lengthy period would have

the effect of turning a young woman with great potential into a hardened criminal permanently lost to society, her family and herself (Id at 10-11).

After this argument and some colloquy, the sentencing Court concluded:

> I don't find, frankly, that I should in any way consider at this time sentencing her under the provisions of the Youth Correction Act. (Id at 16).

Both defense counsel and the United States Attorney joined in asking that the Court make a specific finding that appellant would not derive benefit from treatment under the Act, citing this Court's recent opinion of UNITED STATES against HOPKINS (decided February 11, 1974, Docket No. 73-1530) which required such a finding under 18 U.S.C. § 5010 (d). The Court replied that he was aware of the case, but quoted language from it to the effect that "no litany" was required, and that, as he read the case, he was required only to mention his awareness of the possible application of the Youth Correction Act (Id at 22-23, 15). As to the requirement of a specific finding,, the Court stated:

> I believe under the present circumstances and what's been stated by me already that I think that can certainly be deduced from the remarks I have already made. (Id at 23-24).

After further colloquy, the Court finally ended discussion with,

> I am not prepared to make a finding that she would in any way benefit by this Youth Correction Act. I think on the contrary I find that I must in my thorough review --- and I might tell you, very searching review, and after my colleagues on the sentencing panel, suggested the recommendation, I am convinced that in this case I shall sentence under the adult provisions of the law. (Id at 26).

The Court gave the following reasons for its refusal to sentence to Youth Correction Act treatment. Referring to the standards of the Hopkins case:

> I don't believe the facts in that case are similar to this kind of a case at all. A different matter was involved. It was a 659 charge under Title 18. It didn't involve drugs. (Id at 15)

Referring to appellant her self as a possible Youth Correction Act candidate, the Court said,

> she's not the ordinary so-called individual who . . . doesn't know the nature of her act or that she comes from such terrible circumstances that the family --- she became involved. This young lady was in a different sphere of influence entirely, brought up differently. She's been to college. She's graduated from college. So that she cannot argue from the point of view that she was so-called ignorant of what was going on or that she was befuddled or was drawn into a picture or didn't know what was going on. Not the usual dumb kid who is dragged in. (Id at 9-10)
>
> So when you say she is young --- sure, I wish I was young at 25 or 26. But not that young that we don't know what we are doing at that stage . . . It's not like dealing with a youngster sho comes out of the ghetto, who grows up to know nothing that is right except to commit one crime after another to satisfy whatever may be his problems at the time. (Id at 12-12)
>
> A youngster at this age and this caliber, of this type of background and education, pretty much cannot plead ignorance. (Id at 14)
>
> I am not dealing here with the usual type of individual who comes before us where they have all the --- these personal problems and family problems and all that, things where they really might have an argument that they were unaware of all these ramifications of the law. (Id at 18-19)
>
> Here we don't have --- if I could use the word

> of a dumb kid who didn't know what she or he were doing. We have a person who is in my judgment is far above the average, so that she knew what she was doing. She certainly knew the nature of what she was doing in that she was fooling around with stuff that was, you know, a little bit of dynamite. (Id at 25-26)

For those reasons, the Court sentenced this "far above the average" young woman to four years in prison (Id at 29, 32).

On April 5, 1974, after having extended appellant's surrender date one week, the Court reiterated its denial of bail pending appeal and ordered appellant's remand, notwithstanding the absence of opposition by the United States Attorney to appellant's release on her own recognizance. Motion was made to this Court, and on April 16, 1974, this Court ordered her release pending decision on appeal.

ARGUMENT

POINT I

BECAUSE THE DECISION TO FOREGO REHABILITATION ALTERNATIVES AND TO IMPOSE A 4 YEAR ADULT PENAL SENTENCE ON A 25 YEAR OLD FEMALE FIRST OFFENDER WAS EXPRESSLY BASED ON THE NATURE OF THE CRIME, A DRUG OFFENSE, DESPITE, AND BECAUSE OF, HER "FAR ABOVE AVERAGE" EDUCATIONAL AND SOCIAL BACKGROUND, THE SENTENCE WAS BASED ON ARBITRARY AND IRRATIONAL CRITERIA, WAS NOT IMPOSED ACCORDING TO LAW, AND THE SPECIFIC NO BENEFIT FINDING WAS NOT MADE.

The sentencing court, having agreed to consider appellant eligible for Youth Corrections Act treatment, misconstrued its obligations under this Court's mandate of UNITED STATES vs. KAYLOR and HOPKINS, 491 F2d 1127 (1974), hereinafter referred to as UNITED STATES vs. HOPKINS, and improperly sentenced appellant to four years imprisonment in an adult penitentiary for her first offense of "delivering" four ounces of cocaine. The Court below failed to make a specific finding that appellant would not derive benefit from treatment under the Youth Corrections Act, misconstruing the HOPKINS "no litany" language as permitting such a finding by "deduction", (minutes of 3-25-74 at 23-24) and gave reasons for its refusal to sentence her under the Act (gleaned from colloquy between Court and counsel) that had been held by this Court in HOPKINS not to be cognizable under the Act, the kind of reasoning evidencing "plainly arbitrary, irrational or unsound determination." UNITED STATES v. HOPKINS, supra at 1140.

Appellant was 25 years old at the time of the plea and sentence, a*

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* See discussion, infra, for the circumstances surrounding the plea and sentence understanding that she be sentenced as if eligible for the procedures of the YOuth Correction Act.

college graduate and a working commercial artist. Her father is a New York High School teacher. She had no prior criminal record, and she cooperated fully with the government and admitted and recognized the foolishness and criminality of her act. One month after the act, in full contrition, she waived indictment and trial and pleaded guilty to the one count information. She asked the judge for mercy and an opportunity to prove her intentions to lead a law-abiding life. She was engaged to be married, and during the pendency of this appeal she has married. Given this background, appellant is the ideal candidate for whatever rehabilitative services the law would provide, the perfect example of a young person who, if the scourge of adult penal incarceration is avoided at this delicate stage of her life, might be saved from hardened criminality. UNITED STATES v. COEFIELD, 476 F2d 1152, 1155-56 (D.C. Cir., 1973). Indeed, the Youth Corrections Act and the Young Adult Offenders provision of the adult sentencing law were intended for just such a person; no exceptional or aggravating circumstances* appear on the record here to justify the judge's ultimate conclusion that appellant should be one of those rare cases where rehabilitation would do no good. UNITED STATES v. HOPKINS, supra at 1140, 1139 n. 9; UNITED STATES v. TOY, 482 F2d 741, 744 n. 4 (D.C. Cir., 1973).**

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*Apparently some information appeared in the probation report concerning small quantities of marijuana and cocaine found in appellant's apartment and concerning statements allegedly made to the agents by appellant that she had sold a small quantity of cocaine immediately prior to her arrest. Appellant specifically denied that this information was correct; she denied making the statements. The Court, however, continued to accept the truth of the report: "She doesn't want to admit it." (Minutes of 3-25-74 at 6). To the extent that the Court relied on an inaccurate and untruthful report, the sentence should be vacated. UNITED STATES v. MALCOLM, 432 F2d 809, (2d Cir., 1970); UNITED STATES v. DRISCOLL, decided May 6, 1974, 2d Cir., slip op. at 3261; UNITED STATES v. WESTON, 448 F2d 626 (9th Cir., 1971).

**The rare case was UNITED STATES v. BUTLER, 481 F2d 531 (D.C.Cir, 1973), where the defendant was totally without remorse for a brutal murder, had

(footnote continued on next page)

The sentencing Court, once having agreed to apply the HOPKINS principles of Youth Corrections Act consideration to appellant and referring directly to that case, refused to make a specific no benefit finding, despite the request of counsel for the government and the defense. He said these things relevant to a specific finding: (1) no litany was required; (2) it could be "deduced" ; (3) "I am not prepared to make a finding that she would in any way benefit by this Youth Corrections Act.... on the contrary ... I am convinced ... I shall sentence under the adult provisions of the law." According to HOPKINS, the Court here did not make the determination mandated by 18 U.S.C. § 5010 (d), and the Court's descretion to sentence to adult imprisonment was not properly exercised. Although this Court did say no litany was required, (UNITED STATES v. HOPKINS, supra at 1139), that was in reference to the statement of reasons for denial of Youth Corrections Act, not to the specific and expressed finding of no rehabilitative benefit, which was to precede a statement of reasons. And it was to avoid the task of "deducing" such a finding from a judge's remarks in the record, that prompted the HOPKINS requirement of the explicit no benefit finding, rejecting the guessing game of implicit denials. Furthermore, the judge was not required to find a conceivable benefit before he could sentence under the Act; benefit is presumed until he explicitly finds no benefit is possible.

> A sentence under the Act does not require the sentencing court to make an affirmative finding that the youth offender would benefit from such a sentence. Under section 5010 (d) of the Act the eligible youth is entitled to the opportunity the act affords for rehabilitation unless there is an affirmative and ex-

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* admitted to a long history of patterned criminal behavior, had not intent to change his life style, had assaulted a guard in his escape from previous commitment to a Youth Center, and posed a danger to the community should he escape again.

> plicit finding he would not benefit from treatment under subsection (b) or (c) of section 5010. UNITED STATES v. MATTHEWS, 480 F2d 1191 (D.C.Cir., 1973).

The Court did indicate two reasons for its conclusion not to sentence under the Youth Correction Act: (1) "A different matter was involved [in HOPKINS]. It was a 659 charge under Title 18. It didn't involve drugs" (minutes of 3-25-74 at 15); and (2) appellant is "not the usual dumb kid who is dragged in" (id at 9-10) . . . "We have a person who in my judgment is far above the average, so that she knew what she was doing." (Id at 25-26). We submit that neither of these reasons is cognizable within the meaning and intent of the YOuth Correction Act. In HOPKINS itself this Court specifically rejected as justification for Youth Corrections Act denial the kind of crime committed.

> Nowhere is there any indication that the type of crime committed, elements of immorality or violence involved therein, or related factors are to be considered per se to require denial of treatment under the Act. . . .
> UNITED STATES v. HOPKINS, supra, at 1137.

The District of Columbia Circuit was confronted with the same argument in UNITED STATES v. HOWARD, 449 F2d 1086(1971); the crime was first degree murder and the government argued this precluded Youth Corrections Act treatment. The Court held there was no such criterion in the language of the statute, and the Court would not supply it. But, besides the absence of the criterion in the language and purpose of the Youth Corrections Act, the"type of crime" factor should, according to this Court, be absent from any sentence determination, especially when it indicates an across-the-board attitude on the part of the judge.

> We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant. UNITED STATES v. BAKER , (decided November 7, 1973, Docket No. 73-1598) slip op. at 283.

Thus, the Court's own words stating a certain sentencing policy in drug cases* (see the sentencing Court's sentence in another drug case criticized by this Court in UNITED STATES v. DRISCOLL, infra) together with the otherwise unexplained severity of four years adult imprisonment on a young female first offender with an otherwise excellent background, together with the Court's second reason for this sentence ("she's no dumb kid"), illustrate quite clearly a fixed and mechanical imposition of sentence without an open, proper exercise of discretion. Where such a procedure is evident, whether Youth Corrections Act is under consideration or not, this Court and others have overturned the sentence. UNITED STATES v. BROWN, 470 F2d 285 (2d Cir., 1972); WOOSLEY v. UNITED STATES, 478 F2d 139 (8th Cir., 1973); McGEE v. UNITED STATES , 462 F2d 243 (2d Cir., 1972); UNITED STATES v. WILSON, 450 F2d 495 (4th Cir., 1971). So in this case, whether or not this Court finds the HOPKINS standard unapplied or even inapplicable here, the expressed application of the sentence criteria used by the Court below may not be sustained as lawful and rational exercise of general sentence discretion.

Further example of the "arbitrary, irrational or unsound determination" of sentence in this case was the Court's "dumb kid" criterion. Throughout the proceddings in this case, the Court repeated that he would not consider Youth Corrections Act for appellant because she was "far above average", an

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* The irrationality of making distinctions between crimes for the purpose of (footnote continued on next page)

intelligent college graduate with a good background, and not a "dumb kid" from ghetto circumstances who was unaware of the nature of her act. Here again is the fixed sentence policy, and it is based on an absolute reversal of what would ordinarily be considered characteristics indicative of Youth Corrections Act or any other possible rehabilitative sentencing alternative. The Court seems to say that the only rehabilitatable youths, or the only ones he will so sentence, are those who come from the ghetto and who are of such limited intelligence that they cannot distinguish between right and wrong.* For the judge, poverty and mental retardation are the only criteria for rehabilitation, and emotional problems are confined to ghetto children. Apparently, the judge would have us decide that youths who have had some economic and social advantages and, nevertheless commit one criminal act, have no psychological or emotional problems amenable to counseling and understanding. By the commission of that act, according to the judge's reasoning, these youths are lost to us, despite, as in this case, the exhibition of such encouraging factors as high intelligence, the self-discipline to complete a positively oriented and socially desirable college education and productive and steady employment, and the support of a relatively stable and economically secure family and marriage waiting outside the judicial-penal environment. And indeed, the judge's theories will be self-predicting if they are followed; this young woman will be lost to us after the experience of four years hard core prison life with its

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rehabilitative sentencing is evident here. It is difficult to see how Hopkins, who was convicted of an especially violent type of truck hijacking where personal assault was committed, deserved rehabilitative treatment, according to the judge, but appellant, who acted merely as a conduit for a small quantity of non-addictive drugs did not. "The punishment should fit the offender and not merely the crime." WILLIAMS v. NEW YORK, 337 U.S. 271 (1949).

*The Court seems to overlook the fact that if it has determined a particular youth didn't know what he was doing or didn't know the difference between right and wrong, the Court could not permit a guilty verdict to stand, nor accept a guilty plea, let alone sentence to Youth Correction Act.

well documented effects on the young. We submit that such reasoning as the Court's does not exhibit a "present and visible rationality" necessary to support any sentence, let alone one denying Youth Corrections Act treatment. UNITED STATES v. RILEY, 481 F2d 1127, 1129 (D.C.Cir., 1973); UNITED STATES v. HOPKINS, supra. Courts have rejected similar kinds of criteria in Youth Corrections Act denials: "a rather street-wise individual," UNITED STATES v. WARD, 454 F2d 1200(D.C.Cir., 1973); "street corner sophistication," UNITED STATES v. WARD , 454 F2d 992 (D.C.CIr., 1971). In sum, intelligence and good background are not inconsistent with possible rehabilitation under the YOuth Corrections Act (UNITED STATES v. FORREST, 482 F2d 777 (D.C.Cir., 1973), and the "simple oral recitation" of these factors without an explanation of how they evidence incapacity to benefit under the Act is insufficient to satisfy the mandate of 5010 (d). UNITED STATES v. RILEY, supra; UNITED STATES v. PHILLIPS, supra.

While it is true that the appellant was 25 years old at the time of "conviction" on her plea of guilty, the record supports the understanding of all the parties involved, that she would be sentenced as if eligible under the provisions of the Youth Correction Act. No promise was made that she would in fact be sentenced to Youth Corrections treatment*, but the understanding of appellant and her counsel, the plea and sentencing judges, and the United States Attorney was that the sentencing would be conducted timely for the purposes, and under the provisions, of the Youth Corrections Act.

*The Court at the plea proceedings made this clear, and appellant herself affirmed during the plea catechism that no such promise had been made to her (see minutes of 2-19-74 at 6, 7, 9) but this does not bear on the separate understanding surrounding the plea and sentence that she would be sentenced prior to her 26th birthday in order to be considered eligible, according to the law as understood by counsel and court, for the sentencing procedures
(footnote continued on next page)

At the plea, the Court acceded to counsel's request that the pre-sentence investigation and the sentencing itself be completed before appellant's 26th birthday so that she could be considered eligible for Youth Corrections Act. The hasty waiver of indictment and the plea to the one count information only one month after the crime was for this purpose. Although there is law to the effect that her age at time of verdict or plea would be determinative, both Court and counsel wished there be no ambiguity on this issue, and the Court itself thought he'd have no power after that 26th birthday date. The Court set March 22, four days prior to her 26th birthday, as the sentencing day, and agreed to make a special request by memorandum to the Probation Department and sentencing judge that she be sentenced with consideration to Youth Corrections Act prior to her birthday. Apparantly having received that memorandum and after hearing counsel's explanations for the abbreviated procedures, the sentencing judge clarified the understanding:

> I want the record clear that Judge Mishler . . . meant to infer . . . that she would be eligible in the discretion of the Court, to receive that treatment. . . .
> (Minutes of April 5, 1974 at 6-7).

Further indication of the understanding that pervaded these proceedings is the March 22d assent by Judge Travia to counsel's request that sentencing before March 26 was necessary for Youth Correction Act purposes; the entire colloquy among the parties on March 25, the sentencing day, with reference to Youth Corrections Act treatment, the HOPKINS case, and the requirements of specific findings; the request on that day by the Assistant United States

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of Youth Corrections Act. HERMAN v. CLAUDY, 350 U.S. 116, 121 (1956); UNITED STATES ex rel McGRATH v. LAVALLEE, 319 F2d 308 (2d Cir., 1963); UNITED STATES v. HOWARD, 407 F2d 1102, 1104 (4th Cir., 1969).

Attorney that the judge make the specific finding; and the judge's own acknowledgement of what he conceived to be his obligation under HOPKINS and 5010(d). Throughout, all references were to the Youth Corrections Act and to appellant's eligibilty thereunder. Although it may be assumed the parties were aware of the somewhat different criteria of the Young Adult Offenders provision, 18 U.S.C. 4209, under which appellant could always have been sentenced, without special agreements, understandings of abbreviated procedures, no references were ever made to it. It was always assumed and especially understood by appellant and her counsel (and the United States Attorney joined in the request for the specific finding) that HOPKINS and 18 U.S.C. 5010(d) would be directly applicable. That being the assumption upon which the plea and sentence were made, it should have been carried out with all of the attendant law and policies, and it may not now be argued that there was no such obligation on the sentencing court. SANTOBELLO v. NEW YORK, 404 U.S. 257 (1971).

As we have argued above, even if this Court chooses to hold that the HOPKINS specific finding requirement was met, or that the Court below had no obligation to follow HOPKINS and 5010 (d) , the length of the adult sentence imposed on appellant and the decision to forego the other various rehabilitation alternatives was still the result of expressed irrational sentence criteria, a fixed sentence policy based on the type of crime and the absence of ghetto experience in appellant's background, a kind of reverse bias against intelligence and good family background that in the judge's order of things, called for a shockingly severe sentence on a female first offender. Although in a non-Youth Corrections Act situation, the court may not need to give its reasons for a severe sentence (cf. McGEE v. UNITED STATES, supra; WOSLEY v. UNITED STATES, 478 F2d 139 (8th Cir., 1973); UNITED STATES v. WILSON, 450 F2d 495

(4th Cir., 1971); UNITED STATES v. TOY, 482 F2d 741 (D.C.Cir., 1973) where it does choose to elaborate and reveals a plainly irrational basis for a sentence so out of line with the background of the individual and the penalty usually exacted under the circumstances, the sentence is illegally imposed and should be vacated. That this was an especially harsh sentence for someone in appellant's circumstances is illustrated to some extent by comparison with the average sentence for all convicted drug offenders in the ninety federal district courts during the fiscal year ended June 30, 1973, including all those who were convicted after trial and who had extensive criminal backgrounds, and large conspiratorial involvements, 45.5 months.* Appellant received 48 months. Figures for the fiscal year 1971 for 89 district courts, show an approximate average sentence of 2 years for narcotics defendants with no prior records who waived trial and pleaded guilty.** Appellant received four years. There is no rational explanation for this severe sentence and the explanations given do not account for it. This Court has not been unmindful of unexplained harsh sentences and in a few instances has actually vacated and remanded (see authorities cited above). We urge the same action here. And recently, in a case before this Court involving an appellant who was 29 years old, with some "minor" dealings in narcotics, who had resisted arrest and escaped the jurisdiction, who had one prior felony conviction, and who was convicted after a plea to unlawful importation of hashish, this Court said"

> Judge Travia's failure to state the reasons for the sentences totalling 12½ years in prison which appear rather harsh on the record before us, raises a more serious question. . . We have encouraged the sentencing judge to

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* Annual Report of the Director , Administrative Office of the United States Courts, 1973 at p. A-51, Table D5.

** Administrative Office of the United States Courts, Federal Offenders in United STates District Courts, 1971, comparing Table 22b at p. 61 and Table 14 at p. 53.

> state his reasons, especially where to do so would clarify doubts as to possible reliance upon misinformation of constitutional magnitude or failure to consider mitigating circumstances. In view of the apparently unwarranted harshness of the consecutive sentences imposed, a statement of reasons would have been welcomed by us in the present case. . . . he does not appear to be a hardened recidivist or a person posing a serious threat to society. . . the sole reasons suggested by Judge Travia for the harsh sentence were that appellant had been "quite a scamp" (A-77a), "a little bit incorrigible from his early youth," and had become "involved with the law on many occasions". (A-103-a) . . . Although we adhere to our rule against appellate review of sentences --at least one of us with some reluctance in this case-- we suggest that, in view of the apparent uncertainty as to appellant's record and other relevant circumstances, the conscientious district judge may wish sua sponte to again review the record and determine whether there should not be a reduction in the sentence imposed upon appellant."
> UNITED STATES v. DRISCOLL, (2d Cir., decided May 6, 1974, Docket No. 73-2005) slip op. at 3261-63.

See also UNITED STATES v. GERVASI, (2d Cir., decided April 25, 1974, Docket No. 74-1064). (We do feel that the sentence [7 years on counterfeiting verdict] may be unnecessarily harsh in view of the pre-sentence report and the proceedings at sentence. We therefore urge the District Court to give careful consideration to any motion for reduction of sentence, pursuant to Rule 35 . . .").

Whereas in these two above quoted cases the sentencing court had not stated its reasons and no illegal procedures or sentence factors appeared on the record, we have shown in this case, not only the "failure to consider mitigating circumstances" (UNITED STATES v. DRISCOLL, supra,) but the utilization of those circumstances as the reasons for imposition of a harsher sentence. Here, irrational and unlawful criterion were expressed on the record and the sentence should be vacated and the matter remitted to a different judge for resentencing. UNITED STATES v. BROWN, 470 F2d 285(2d Cir., 1972); MOWSON v. UNITED STATES, 463 F2d 29 (1st Cir., 1972).

CONSLUSION

FOR THE ABOVE STATED REASONS THE SENTENCE SHOULD BE VACATED AND THE CASE REMANDED TO A DIFFERENT JUDGE FOR RESENTENCING.

Respectfully submitted,

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LAWRENCE STERN
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

LINDA SCHWARZ, : AFFIDAVIT OF SERVICE

Defendant-Appellant. : 74-1455

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DOMENICK J. PORCO, being duly sworn, deposes and says:

1. That he is not a party to the action, is over 18 years of age, and resides at 4190 East Tremont Avenue, Bronx, New York 10465.

2. That on May 20, 1974 deponent served two copies of brief for Appellant and two copies of appendix for Appellant on Edward J. Boyd, United States Attorney for the Eastern District of New York, attorney for appelle in this action, at United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, by depositing said copies enclosed in a post-paid properly addressed wrapper in official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Domenick J. Porco
DOMENICK J. PORCO

Sworn to before me this
20th day of May, 1974.

HOWARD J. DILLER